

NTSB Order No. EA-4249

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of September, 1994

Docket SE-13059

aircraft over an uncongested area less than 500 feet from a structure on the surface, in violation of 14 C.F.R. 91.119(c) and 91.13(a).² For the reasons discussed below, respondent's appeal is denied and the initial decision is affirmed.

The record in this case establishes that on May 1, 1992, as respondent was completing a simulated emergency landing maneuver in the vicinity of the William Tuck Airport in South Boston, Virginia, his Champion 7GCAA aircraft struck something in his flight path, causing substantial damage to the aircraft. According to respondent, during the simulated forced landing maneuver, he descended to approximately 180 feet AGL³ over an uncultivated field. When he applied full power and began to climb, he felt a tug on the right side of his aircraft followed by a sound "like a giant rubberband being plucked." (Exhibit A-13, respondent's letter to FAA Inspector Phelps.) Respondent

² **§ 91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * *

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

* * *

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ Above ground level.

described the field as being five miles southwest of the airport, 2000 to 3000 feet long, having an east-west orientation, and bordered on the north by a road and a utility line and on the east and south by trees. Despite the damage to his aircraft, respondent landed his aircraft safely at the airport five miles away.

FAA Safety Inspector John Phelps, who investigated this incident, testified that he conducted an aerial search for the field where the incident occurred, but due to the large number of fields in the vicinity of the airport, was unable to positively identify the site.⁴ Accordingly, he could not conclusively determine what it was that respondent's aircraft struck, or whether the item was marked on current aeronautical charts. He knew of no structure collapsing in that area on that day, and had no reports of telephone or power line damage. However, he testified that the damage he observed on respondent's aircraft was characteristic of the type of damage which would result from a wire strike,⁵ and further testified that a wire is considered a

⁴ Respondent questions Inspector Phelps' inability to locate the field, noting that he gave detailed information as to its location and orientation in his letter responding to the FAA's letter of investigation. (Exhibit A-13.) However, Inspector Phelps had not yet received respondent's letter -- which was apparently not sent until approximately July 3, 1992, some two months after the letter of investigation to which it responded -- when he searched for the field, and had apparently been given little guidance from respondent during their telephone discussion of the incident (Exhibit A-10, record of telephone call with respondent). Inspector Phelps explained that limited resources prevented him from conducting a second search after he received respondent's letter.

⁵ Specifically, Inspector Phelps testified that the damage

"structure." In sum, Inspector Phelps' concluded that respondent had violated section 91.119(c) and 91.13(a) by carelessly operating his aircraft closer than 500 feet to a structure.

Respondent maintains that he followed proper procedures in selecting a location for his simulated emergency landing, and that he should not be held responsible for hitting an object that he could not see and that was not marked on aeronautical charts.

He claims that he saw no obstructions in his path over the field, and that he does not know what his aircraft hit. Although respondent takes issue with the FAA's inability to locate the scene of his accident and to positively identify the object he struck, he concedes that he made no effort to locate the field or to identify the object himself, a circumstance which essentially precludes any determination as to whether respondent's failure to avoid the object he struck was excusable.

The law judge acknowledged that there was no direct evidence as to what respondent struck, but concluded that there was "strong circumstantial evidence that whatever it was, it involved wires strung up as part of a structure" (Tr. 221), and cited Board precedent construing the term "structure" to include objects such as electrical or telephone wires, as well as the poles between which they are strung (edited initial decision at

(..continued)
sustained by the aircraft's wings, strut, landing gear, and propeller blade (pictured in Exhibits A-4 through A-7), was consistent with a wire strike, and that none of the damage had any characteristics of other types of strikes. He also noted the absence of any debris (such as leaves, wood, or feathers) which would indicate contact with a tree or birds.

Tr. 220). The law judge also noted that, even though respondent claimed there was no visible obstruction in his path, he made no effort to substantiate this claim by locating the field after the incident. He held that respondent's "failure to make even a minimal effort [in this regard] tends to support an inference that he knows what he hit, or at least has some idea." (Tr. 223.) In sum, the law judge held that respondent carelessly flew within 500 feet of a structure, in violation of section 91.119(c) and section 91.13(a), and affirmed the Administrator's order of suspension in its entirety.

On appeal, respondent argues that the Administrator did not establish a violation of section 91.119(c), because he did not prove what respondent struck, or that it was attached to a structure closer than 500 feet to respondent's aircraft. He asserts that Inspector Phelps was not sufficiently qualified to give expert testimony as to the likely cause of the damage to respondent's aircraft. Respondent also argues that the section 91.13(a) charge cannot be upheld on the basis of the Lindstam doctrine,⁶ which the Administrator attempted to rely on, because the Administrator alleged a specific act of negligence (operating

⁶ Under the Lindstam doctrine, first articulated in Gordon H. Lindstam, 41 CAB 841 (1964), the Administrator need not allege or prove specific acts of carelessness to support a violation of section 91.13(a). Instead, using circumstantial evidence, he may establish a prima facie case by creating a reasonable inference that the incident at hand would not have occurred but for carelessness on the respondent's part. The burden then shifts to the respondent to come forward with an alternative explanation for the event sufficient to overcome the inference of carelessness.

less than 500 feet from a structure), and because respondent followed all proper procedures in preparing for his simulated forced landing maneuver. He also asserts that striking a wire is not per se careless,⁷ and appears to take the position that the wires he struck were not foreseeable, as they were neither shown on charts nor marked so as to be discernible from the air.

Respondent further challenges the section 91.13(a) violation by asserting that the law judge's finding that respondent caused potential endangerment by continuing his flight to the airport in the damaged aircraft, went beyond the bounds of the allegations in the complaint. Finally, respondent urges the Board to modify the sanction in this case to remedial training, arguing that he meets the requirements for participation in the FAA's remedial training program, and that no disciplinary suspension is required because the damage to his aircraft "should be punishment enough."

We find no error in the law judge's holding that Inspector Phelps was sufficiently qualified to give opinion testimony as to the cause of the damage to respondent's aircraft. Inspector Phelps, himself an ATP-rated pilot, testified that he has attended two FAA accident investigation training courses (each lasting several weeks), during which he was taught how to recognize and analyze the distinctive features of damage resulting from various types of collisions, including wire

⁷ Respondent cites Arnold W. Rawlinson, 45 CAB 935 (1966), where our predecessor agency, the Civil Aeronautics Board, held that striking power lines was not careless where the wires were neither shown on aeronautical charts nor marked so as to be discernible from the air.

strikes. Although he had not served as lead investigator in any prior accidents involving wire strikes, he did recall assisting in the investigation into one such accident. We disagree with respondent's assertion that Inspector Phelps was not qualified to give an opinion as to the cause of the damage in this case. We note that respondent presented no expert testimony to rebut Inspector Phelps' opinion that the damage was due to a wire strike and, indeed, appears to agree in some parts of his appeal brief that the accident was due to a wire strike. We also reject respondent's contention that wires should not be considered a structure. Our case law holds to the contrary,⁸ and we see no reason to alter our position.

We hold that the Administrator presented sufficient circumstantial evidence to raise an inference that respondent's aircraft struck a structure -- most likely a wire or wires -- and, in our judgment, this constitutes prima facie proof that he violated sections 91.119(c) (operating closer than 500 feet to a structure) and 91.13(a) (careless or reckless operation).⁹ The burden then shifted to respondent to either rebut the inference that he hit a structure, or to show that he could not reasonably be expected to know of the structure's presence before hitting it. Respondent failed to introduce any evidence on either point. While the then-current aeronautical chart did not show any wires

⁸ Administrator v. Scollan, 2 NTSB 538, 539 (1973).

⁹ Accordingly, since the Administrator alleged and established a specific act of negligence, the Lindstam doctrine is not necessary to establish carelessness in this case.

or cables in the immediate area where respondent claims the incident occurred, we see no basis for finding that respondent has accurately related the location of the accident and thereby established that what he hit was not marked on the chart. Moreover, although respondent asserts he did not see the object and does not know what it was he hit, the law judge was skeptical, and suggested that respondent's failure to return to the scene in order to substantiate his claim that the object was not discernible from the air, indicates an awareness that the claim could not be substantiated.

Although striking a wire may not always constitute conclusive proof of carelessness (see Rawlinson, 45 CAB 935 (1966)), we think the un rebutted evidence in this case indicating that respondent hit an object while flying at an extremely low altitude over relatively unfamiliar territory, supports a finding that respondent's operation of the aircraft was careless. Moreover, while we agree that the law judge went beyond the complaint in finding that respondent's continued flight to the airport created potential endangerment, there is sufficient evidence that respondent's operation within 500 feet of a structure on the surface, as alleged in the complaint, at the very least endangered the object that was struck. Thus, even disregarding the law judge's comments regarding potential endangerment caused by his continued flight, the section 91.13(a) violation is adequately supported in the record.

Finally, regarding respondent's assertion that we should

modify the sanction in this case to remedial training, we note that we have no authority to substitute an administrative action (such as a warning notice, letter of correction, or remedial training program) for a legal enforcement action (e.g. a certificate action or a civil penalty).¹⁰ The Administrator's decision to pursue a legal enforcement action in a particular case is a matter of prosecutorial discretion which we do not generally review.¹¹ The 30-day suspension sought in this case is not inconsistent with precedent.¹²

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed, as consistent with this opinion and order; and
3. The 30-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.¹³

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

¹⁰ Administrator v. Brune, NTSB Order No. EA-4108 at 4, n. 7 (1994), citing cases.

¹¹ Administrator v. Rigsby, NTSB Order No. EA-3860 (1993); Administrator v. Obrecht, NTSB Order No. EA-3754 at 2 (1992).

¹² See Administrator v. Scollan 2 NTSB 538 (1973) (35-day suspension affirmed for striking electrical wires).

¹³ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).